



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-93-13*

FACTS:

You are the Town Counsel for the Town of North Brookfield (Town). Due to the recent death of one of the members of the Town's Board of Selectmen (Board), the Board is currently composed of two selectmen. A special election to fill the vacant Board seat is scheduled for July of 1993.^{1/}

On April 21, 1993, the American Legion applied for a pouring license for use in a building which is owned by one of the selectmen and which will be leased to the American Legion, contingent upon the American Legion's receipt of the pouring license from the Board. If the American Legion does not obtain a pouring license, it will seek to lease property in another location.

In an unrelated case, on April 23, 1993, a restaurant owner who is currently leasing property from a partner of one of the selectmen (the other sitting selectman) applied for a pouring license. You tell us that, for the reasonably foreseeable future, the restaurant's current leasing arrangement is likely to be unaffected by the Board's decision on a pouring license. The leasing arrangement, by its own terms, is not contingent upon the lessee's ability to obtain a pouring license. In addition, you tell us that the restaurant is already operating from its current location without a pouring license, and any resulting relocation of the restaurant upon completion of the current lease term is speculative.

A "pouring license" for beverages to be drunk on the premises may be granted by the local licensing authority pursuant to G.L. c. 138, §12. Section 15A of G.L. c. 138 provides that with regard to license applications under §12, the local licensing authority (the selectmen) must cause a notice to be published within ten days after receipt of a pouring license application. The local licensing authority may take action on an application only after a hearing which may not be held sooner than ten days after the publication of the notice. Pursuant to G.L. c. 138, §16B, applications for licenses shall be granted or dismissed by the local licensing authority not later than 30-days after the filing of the application. Any applicant who is aggrieved by the action of a local licensing authority in refusing to grant an application, or by failure to act within the 30 day period, may appeal to the Alcohol Beverages Control Commission (ABCC). You tell us that the ABCC has jurisdiction only to approve or disapprove of the action of the local licensing authority and must then remand the matter to the local licensing authority for further action. The ABCC may not, in any event, order a license to be issued to any applicant except where the application for the license application has first been approved by the local licensing authority. The ABCC does not have the ability to compel a local licensing authority to grant a license. Rather, if the ABCC disagrees with the denial of a license, it may remand the matter for further action by the local authority.

QUESTIONS:

1. May the Selectman who is himself the landlord of a license applicant participate in discussions or votes in connection with the pouring license application submitted to the Board?
2. May the Selectman whose partner is the landlord of a license applicant participate in discussions or votes in connection with the pouring license application submitted to the Board?

ANSWERS:

1. Yes, because of the rule of necessity.

2. Yes.

DISCUSSION:

1. Selectman/Landlord

Section 19 of G.L. c. 268A provides that a municipal employee may not participate^{2/} in any particular matter^{3/} in which to his knowledge, he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest. Such a financial interest may be of any size, and may be either positive or negative. *EC-COI-89-33; 89-19*. Furthermore, whether the financial interest is direct and immediate, or reasonably foreseeable, the §19 restriction is implicated. *EC-COI-89-19*.

You have informed us that with regard to the Selectman who is himself a landlord, without issuance of a pouring permit, his tenant will withdraw from the contemplated leasing arrangement. In light of these facts, it is reasonable to conclude that the Selectman's financial interest will be affected by the Board's decision on the pouring license application. Consequently, §19 would normally prohibit the selectman's participation in the Board's actions (including discussions or hearings) concerning that particular license application.

The rule of necessity was established by the courts to allow public officials to participate in official decisions from which they are otherwise disqualified by their bias, prejudice or interest when no other official or agency is available to make that decision. *See Moran v. School Committee of Littleton*, 317 Mass. 591, 594 (1945); *Graham v. McGrail*, 370 Mass. 1233, 138 (1976) (suggesting that the rule would apply in proper circumstances where public officials could not participate due to G.L. c. 268A); *see also Georgetown v. Essex County Retirement Board*, 29 Mass. App. Ct. 272 (1990).

The Commission has historically stressed the narrow circumstances in which the rule of necessity may be invoked. Specifically, the Commission has held that the rule of necessity may not be validly applied where another qualified tribunal can be found or where the governmental body's inability to act is due in part to the mere absence or illness of a member. *See EC-COI-92-24; 82-10; 80-100*. In other words, only where the municipal body cannot obtain the quorum necessary to take action because of disqualification (because of conflicts of interest) may the rule of necessity provide a mechanism by which all members may act notwithstanding any conflicts of interest.

In a recent opinion concerning the rule of necessity, we held that the rule would apply to a situation where disqualification due to conflicts of interest would deprive the governmental body of the number of members necessary to take a valid affirmative vote. *EC-COI-93-3*. In that particular case, although a majority of the members of a municipal board were qualified to consider the matter at issue, we found that the rule could be applied in a situation where, because of conflicts of interest and the type of matter being considered (requiring a supermajority for an affirmative vote), the body could never approve (or act affirmatively with regard to) the matter.

Here, a novel issue concerning applicability of the rule of necessity is presented. We have not previously considered the rule's applicability where one position on a board is vacant and cannot be filled in time to comply with a time requirement for taking action imposed on the board by a statute. Under these circumstances, the resulting question is whether the rule can be invoked as to the current two-member board where one board member would otherwise be disqualified due to a conflict of interest.

We believe that the rule of necessity should apply in a situation where statutory time restrictions require the Board to act, where a vacancy on the Board cannot be filled in time to meet those time restrictions and where, as a result, the Board cannot obtain a quorum due to the disqualification of one or more of its members.^{4/} If the rule is not applied in this situation, the Board will be unable to fulfill its statutorily required responsibilities because of a conflict of interest. Here, the other requirement for the rule's applicability is met because neither the ABCC nor any other entity may carry out the task of issuing a pouring license. We therefore find that under circumstances such as those presented here, the rule of necessity may be applied. To find otherwise, we would frustrate the explicit legislative purpose of having an important public decision, such as the granting of a liquor

pouring license, made in a timely manner by a local licensing authority.

2. Selectman Whose Partner is Landlord.

With regard to the other Selectman whose partner is currently leasing property to an applicant for a pouring license, we must first determine whether that Selectman will be prohibited from participating by virtue of §19. As indicated above, §19 will prohibit a municipal employee from participating in a matter in which his partner has a direct and immediate or reasonably foreseeable financial interest. Here, the applicant is already operating his business from the leased premises and is unlikely, in the foreseeable future, to alter his lease arrangement as a result of an unfavorable decision by the Board concerning the pouring license. Based on the facts provided to us, it does not appear that the partner of the Selectman in question would have a direct and immediate or reasonably foreseeable financial interest in the restaurant owner's ability to obtain a pouring license.^{5/} Any impact which the pouring license decision might have on future lease arrangements with the applicant is speculative at this time. *See EC-COI-89-19* (financial interests which are remote, speculative, or not sufficiently identifiable do not require disqualification). We caution, however, that were we to have different facts before us, we might be inclined to find that the Selectman's participation is barred under §19. For example, an issue would be raised under §19 if the tenant's restaurant business was likely to fail without the issuance of the license (and therefore the tenant would be unable to fulfill his lease obligations). Similarly, if the lease arrangement contained a term allowing for the Selectman's partner as landlord to share in any of the restaurant's profits, the §19 restriction would be implicated. Should you discover additional facts indicating an identifiable financial interest on the part of the Selectman's partner, you should seek further advice from this Commission.

Date Authorized: May 25, 1993

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

^{1/}Apparently, a total of 64 days are required for the scheduling and holding of a special election. *See* G.L. c. 41, §10; c. 53, §§7, 14.

^{2/}"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

^{3/}"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

^{4/}We note that this opinion is not intended to address the applicability of the rule of necessity to situations in which a board position is vacant and cannot be filled for a period of time, but where the board is not compelled by law to take action before the position may be filled. Likewise, we are not commenting here on the appropriateness of invoking the rule of necessity where the board is required by law to act on a matter within a limited time period and where one of its members is unable to participate for reasons other than vacancy before the expiration of the period in which the board must act.

^{5/}Section 23(b)(3) prohibits a public employee from engaging in conduct that gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties, but allows the employee to dispel any such impression by written public disclosure. Absent an issue under §19, the Selectman in question would nevertheless need to file a written disclosure with the Town Clerk of the landlord/tenant relationship between his partner and the pouring license applicant. Such a disclosure must be made prior to Selectman's participation in Board proceedings relating to the license application.